Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

JOHN DAVID STONER, QUI TAM PLAINTIFF, PETITIONER

v.

SANTA CLARA COUNTY OFFICE OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(United States Supreme Court Bar, application pending)

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in concluding that a California local educational agency under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., is not subject to qui tam actions under the False claims Act (FCA), 31 U.S. C. §§ 3729 et seq., for falsely certifying that it was in compliance with federal and state law,
    a. contrary to the holding in *Cook County v. United States ex rel. Chandler*, 538 U.S 119 (2003) that local governments are subject to the FCA,
    b. contrary to the statutory language of the FCA that distinguishes between local educational agencies and state educational agencies at a time when California school districts were considered local educational agencies that were not protected by the Eleventh Amendment, and
    c. particularly when a California statute specifically provides that "state funds may not be allocated to offset any federal funding intended for individuals with exceptional needs, as defined in [CA Education Code] Section 56026 [defining "Individuals with exceptional needs"], and withheld from a local educational agency due to the agency's noncompliance with state or federal law (CA Educational Code §56845 (c))?
2. Did the Ninth Circuit err in concluding that a qui tam relator under the FCA may not represent

himself pro se,

a. contrary to the holding in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) that a qui tam relator under the FCA is a partial assignee of the United States that has standing to assert the injury in fact suffered by the assignor, and who is sufficiently independent of the government's action to continue even when the government does not intervene,

b. contrary to the holding in *Winkelman v. Parma City School District*, 550 U.S. _____, 127 S. Ct. 1994 (2007), that it is unnecessary to discuss who represents another party that may also benefit from the actions of the pro se party, and

c. contrary to the holdings in *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993) and *Riley v. St. Luke's Episcopal Hospital*, 252 F. 3d 749 (5th Cir. 2001) that the United States retains sufficient control over the litigation even when it does not intervene to prevent the qui tam relator's conduct of the litigation from being an unconstitutional delegation of authority?

LIST OF PARTIES

Plaintiffs/Petitioners

John David Stoner, qui tam plaintiff for United States of America

John David Stoner, individually

John David Stoner, on behalf of the State of California and the County of Santa Clara, California

Defendants/ Respondents

Santa Clara County Office of Education

Colleen B. Wilcox, Ph.D., individually

Joe Fimiani, individually

David Wong (aka Teck Fatt Wong), individually

Colleen B. Wilcox, Ph.D., in official capacity as Superintendent of the Santa Clara County Office of Education, now replaced by Joe Fimiani as Acting Superintendent

Joe Fimiani, in official capacity as Assistant Superintendent, Student Services, of the Santa Clara County Office of Education, now Acting Superintendent

David Wong (aka Teck Fatt Wong), in official capacity as a Principal in the Santa Clara County Office of Education

East Side Union High School District

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In The Supreme Court of the United States

No. _____

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v.

SANTA CLARA COUNTY OFFICE OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

John David Stoner, qui tam plaintiff, proceeding pro se, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-21a) is reported at 502 F.3d 1116. The opinion of the district court granting respondents' motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction (App., *infra,* 22a–38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2007. Petitions for rehearing and rehearing en banc were denied on October 23 and November 23, 2007. On February 4, 2008, in response to an application by Defendants/Respondents for an extension of time within which to file a petition for a writ of certiorari, Justice Kennedy extended the time to and including April 1, 2008.

Jurisdiction for the Supreme Court to hear the petition for certiorari is authorized by 28 U.S.C. § 1254.

Jurisdiction under which the United States Court of Appeals for the Ninth Circuit decided the appeal from the United States District Court is 28 U.S.C. § 1291.

Jurisdiction in the United States District Court for the filing and continuation of this suit is 28 U.S.C. §§ 1331, 1345 and 31 U.S.C. § 3732 and by its general equitable jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The pertinent provisions of the False Claims Act (FCA), 31 U.S.C. §§ 3729 et seq., are reprinted in an appendix to this petition. (App., *infra,* 39a - 46a). The pertinent provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq. are reprinted in an appendix to this petition. (App., *infra, 47*a - 56a)

28 U.S.C. § 1654 provides that: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage

and conduct causes therein."

The United States Constitution, Article II, Section 3, provides that "[H]e [the President] shall take care that the laws be faithfully executed . . . ." Article II, Section 2, clause 2, provides that "He [the President] shall . . . appoint . . . all other officers of the United States . . . ."

The Eleventh Amendment to the United States Constitution provides that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

The California Education Code § 2558(c), provides that: "The Superintendent of Public Instruction shall also subtract from the amount determined in subdivision (a) the sum of : . . (2) state and federal categorical aid for the first year . . . ."

The California Education Code § 56845(c), provides that: "Notwithstanding any other provision of law, state funds may not be allocated to offset any federal funding intended for individuals with exceptional needs, as defined in Section 56026, and withheld from a local educational agency due to the agency's noncompliance with state or federal law."

CONCISE STATEMENT OF CASE

The Complaint in this case alleges that a California School District and a California County Office of Education (Institutional Defendants) and some individuals made false claims under the False Claims Act (FCA), 31 U.S.C. §§ 3729 et seq., to receive federal funds for the purpose of educating students with special needs under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400

et seq. Although the Complaint also included other allegations, those allegations were not addressed by the trial court because the False Claims Act portion of the Complaint was dismissed on demurrer. Thus, these other allegations are not now in issue.

Under the Individuals with Disabilities Education Act, Local Educational Agencies must certify that they are complying with the federal and state laws and regulations in order to obtain federal assistance under that act. This certification was given with respect to the overall special education program provided by the Institutional Defendants in 1998 and 2003, and in annual statements made to receive the funding each year. These certifications were and continue to be false as the defendants knew or should have known if they had not acted in deliberate ignorance or reckless disregard for the truth or falsity of these certifications. Consequently, the Santa Clara County Office of Education and the Eastside Union High School District were in violation of the False Claims Act, 31 U.S.C. §§ 3729 et seq.

Defendants Santa Clara County Office of Education and the Eastside Union High School District are trying to escape accountability on the grounds that they are arms of the state and are therefore protected by the Eleventh Amendment and not subject to the False Claims Act. This position is contrary to the holdings in most states. At the time the False Claims Act was last substantively amended (1986), California school districts, like school districts in other states, were local political entities that were not protected by the Eleventh Amendment. Consequently, they were subject to the False Claims Act under *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003).

Nevertheless, defendants argue that despite no

substantive change in the FCA after 1986, the change in how California school districts and county offices were treated in two Ninth Circuit cases brought by private individuals under 42 U.S.C. § 1983 in the 90's, changed the FCA to exclude California school districts and related institutions. The Ninth Circuit applied this change in this case in which, contrary to the facts in those two cases, the state is prohibited from reimbursing the school districts for a judgment that would involve withholding federal funds as a result of noncompliance with federal and state law. California Education Code § 56845(c)

The reasoning of the Ninth Circuit conflicts with the approach most United States Courts of Appeals, including the Ninth Circuit, use in Eleventh Amendment cases involving other states.

Defendants' position is also contrary to the spirit of the Individuals with Disabilities Education Act, which treats the institutional defendants here as Local Educational Agencies eligible for assistance under 20 U.S.C. § 1413 and not as State Educational Agencies for which the eligibility requirements are provided in 20 U.S.C. § 1412 and which specifically provides that even the state does not have immunity under the Eleventh Amendment "for a violation of this Act." 20 U.S.C. § 1404 (was § 1403 in 2003 when this case was filed).

The District Court here assisted the Defendants in trying to avoid accountability for their actions by sua sponte holding that the individual plaintiff could not represent himself as a qui tam plaintiff pro se, because he was not a member of the California bar, even though there was no showing of incompetence or misconduct on the part of this individual who was a member of the bar in another state. This ruling,

affirmed by the Ninth Circuit, conflicts with opinions of the United States Supreme Court and the opinions of two United States Courts of Appeal. If this ruling is upheld, the qui tam plaintiff will not be able to continue this litigation unless he can find an attorney to represent the qui tam plaintiff before a court that has already evidenced a disposition to get rid of the case. This ruling is also based on reasoning that invites renewed constitutional challenges to the FCA.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

This petition asks for review of two basic holdings by the Ninth Circuit Court of Appeals: first, that the False Claims Act does not apply to California school districts and related institutions; and second, that an attorney who is a member of the bar of the Ninth Circuit Court of Appeals is prevented from being a pro se qui tam plaintiff in a California federal district court without any showing of incompetence or misconduct just because he is not a member of the California bar.

The justification for reviewing the first holding is set forth in Supreme Court Rule 10 (a) and (c).

The United States Court of Appeals for the Ninth Circuit has entered a decision in this case refusing to hold California school districts and county offices of education accountable under the Federal False Claims Act (FCA), 31 U.S.C. §§ 3729 et seq., primarily on the grounds that they are (a) arms of the state and immune under the Eleventh Amendment, and (b) not subject to the FCA because they are considered part of the state. Holding them to be arms of the state that are protected

by the Eleventh Amendment is in conflict with the decisions of the United States Courts of Appeals, in all the Circuits, including the Ninth Circuit, holding that school districts and/or school boards in other states are local political entities not sharing the immunity of states under the Eleventh Amendment. Protecting school districts under the Eleventh Amendment also conflicts with United States Supreme Court cases holding that school districts can be subject to liability to private persons in the federal courts

These decisions holding school districts and related institutions to be local political entities not subject to the Eleventh Amendment, make those local entities subject to the FCA under *Cook County v. United states, ex rel. Chandler,* 538 U.S. 119 (2003).

Cook County also makes clear that local political entities are appropriately made subject to the FCA because they "are commonly at the receiving end of all sorts of federal funding schemes and thus no less able than individuals or private corporations to impose on the federal fisc and exploit the exercise of the federal spending power." *Cook County, supra,* 538 U.S. at 128, citing *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, at 685-686.

The monetary importance of decisions affecting school districts and related institutions as recipients of federal funds under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400, et seq., is indicated by the authorizations for appropriations included for most of part B of that act (which is the part involved in this case): i.e., over twelve billion dollars ($12,000,000,000) in 2005, and increasing annual authorizations thereafter, to over twenty-six billion dollars ($26,000,000,000) in 2011. 20 U.S.C. § 1411(i), Pub. L. 108-446 § 611(i). While the appropriations

have not been as large as these authorizations, "IDEA is one of the largest educational programs overseen by the U.S. Department of Education(ED). FY2006 appropriations for the program were $11.6 billion." Congressional Research Service Report for Congress, January 31, 2007, pp. 2-3.

The conflicts with the other circuits on these matters of such financial significance to the United States Government satisfy the requirements for reviewing the first holding as set forth in Supreme Court Rule 10 (a). The conflicts with Supreme Court cases also satisfy the requirements for reviewing the first holding as set forth in Supreme Court Rule 10(c).

The Ninth Circuit's decision below, not allowing the qui tam plaintiff to proceed pro se, also conflicts with relevant decisions of the United States Supreme Court. This is an important federal question not only because the large amounts of money that are involved in FCA actions, but because qui tam plaintiffs are frequently devoid of the financial resources to retain counsel, particularly since they are likely to have been deprived of their employment as a result of their whistle blowing actions. Moreover, the history of this case demonstrates that courts may be hostile to charges against school districts and related institutions, with the result that few attorneys may be willing to take on such cases on a contingent fee basis. If a qui tam plaintiff is required to obtain an attorney and that is not possible, the very purpose of FCA encouraging whistleblowers to bring FCA actions is defeated.

The ruling on the pro se issue also conflicts with two circuit court cases which will invite renewed constitutional challenges to the FCA. Raising these constitutional issues is even more important than

applying the FCA to local school districts. Consequently, the conflicts with the decisions of the United States Supreme Court on the pro se issue (which underlies the entire purpose of the FCA), satisfy the requirements for reviewing the pro se holding as set forth in Supreme Court Rule 10 (a) and (c).

The following sections will describe in more detail the conflicts that exist between the Ninth Circuit holdings in this case and both the decisions of Circuit courts (including the Ninth Circuit) relating to other states and the decisions of the United States Supreme Court.

I. THIS NINTH CIRCUIT DECISION CONFLICTS WITH DECISIONS IN CIRCUIT COURTS OF APPEALS (INCLUDING THE NINTH CIRCUIT) RELATING TO SCHOOL DISTRICTS AND OTHER LOCAL ENTITIES IN OTHER STATES AS WELL AS WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

A. Decisions in the Courts of Appeals relating to other states utilize several rules in determining whether an entity is protected by the Eleventh Amendment.

1. The burden is on the entity claiming immunity under the Eleventh Amendment to prove it is entitled to immunity. *Woods v. Rondout Valley Central School District Board of Education,* 466 F.3d 322 (2nd Cir. 2006) (citing following other circuits in support of its ruling: *Gragg v. Ky. Cabinet for Workforce Dev.,* 289 F.3d 958, 963 (6th Cir. 2002); see *Skelton v Camp,* 234 F.3d 292, 297 (5th Cir. 2000); *Christy v. Pa. Turnpike Comm'n,* 54 F.3d 1140, 1144 (3rd Cir. 1995); *Baxter v. Vigo County Sch. Corp.,* 26 F.3d 728, 734, n.5 (7th Cir.

1994); *ITSI TV Prods., Inc. v. Agricultural Ass'ns,* 3 F.3d 1289, 1292 (9th Cir. 1993)).

Other 2006 cases supporting this rule placing the burden on the entity claiming Eleventh Amendment protection are: *Pastrama-Torres v. Corporacion de Puerto Rico Para La Difusion Publica,* 460 F.3d 124 (1st Cir. 2006); *Febres v. The Camden Board of Education,* 445 F.3d 227 (3rd Cir. 2006).

This requires a separate analysis of new facts when a case arises with different facts from a preceding case that might otherwise be considered as controlling precedent. Thus, in the *Woods* case, *supra,* involving a school district board of education, the court had to make a separate analysis whether that board of education was immune even though it had already determined that a school district itself was not immune.

2. Two factors that are relevant to whether an entity is protected by the Eleventh Amendment are: (a) whether state law treats the entity as independent, or as a surrogate of the state, and (b) the amount of autonomy the entity has. Even where both of these factors slightly favor immunity, however, the entity is still not immune if the judgment would not be paid by state funds. *Fitchik v. Ward,* 873 F.2d 655 (3rd Cir. 1989).

3. The view of the state supreme court on the relationship between the state and the entity claiming that exemption should also be taken into account. Thus, as a result of the Supreme Court of New Mexico holding that a school board was not an arm of the state, *Daddow v. Carlsbad Mun. Sch. Dist.,* 120 N.M. 97, 898 P.2d 1235 (1995), the Tenth Circuit held that school districts and their governing boards in New Mexico are not arms of the state entitled to Eleventh Amendment immunity. *Duke v. Grady Municipal*

Schools, 127 F.3d 972 (10th Cir. 1997) (overruling its prior decision, *Martinez v. Board of Education*, 748 F.2d 1393 (10th Cir. 1984), to the contrary.) The Court added that it agreed with the Fourth Circuit which had said in *Harter v. Vernon,* 101 F.3d 334, 342 (4th Cir. 1996) that "A federal court may 'give deference to the rationale used by a state court.' but the [state] holding is not dispositive as a matter of federal law."

4. An entity claiming immunity on the basis that a judgment would be paid by the state must show that the funds would necessarily be paid by the state. The entity cannot create immunity by using its discretionary authority to use state funds to pay the judgment. See *Kovats v. Rutgers, The State Univ.*, 822 F.2d 1303, 1309 (3d Cir. 1987).

5. Even when a Circuit holds that immunity may be shown by the use of commingled state and local funds, it must be shown that state funds are used if the source of the funding is not commingled with state funds. *Eason v. Clark County School District,* 303 F. 1137, 1142 (9th Cir. 2002) (relating to Nevada school districts and quoting *Belanger*, 963 F. 2d at 252); *Holz v. Nenana City Public School District,* 347 F.3d 1176, 1183 (9th Cir. 2003) (relating to Alaska school districts and quoting *Belanger*, 963 F. 2d at 252); and *Savage v. Glendale Union High School District*, 343 F. 3d 1036, 1042 (9th Cir. 2003) (relating to Arizona school districts and citing *Belanger*, 963 F. 2d. at 252).

6. The fact that the local entities receive a high percentage of their revenues from the state is not enough to establish that the state is sufficiently responsible for the payment of a judgment to provide immunity to the local entity. *Duke v. Grady Municipal Schools*, 127 F.3d 972 (10th Cir. 1997) (The Grady municipal school district in New Mexico received 98%

of its funds from the State. 127 F.3d at 980.); *Holz v. Nenana City Public School District,* 347 F.3d 1176 (9th Cir. 2003) (Alaska state funds provided 98% of the School District's budget. 347 F.3rd at 1182.).

7. The distinction between the exercise of a governmental and the exercise of a proprietary function is no longer a valid criterion in determining whether an entity is protected by the Eleventh Amendment. *Fitchik v. Ward,* 873 F.2d 655, 659, n.2 (3rd Cir. 1989).

B. United States Supreme Court Decisions establish overall rules within which the above rules in the Circuit Courts apply.

1. "[I]t is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." *Regents of the University of California v. John Doe*, 519 U.S. 425, 431 (1997).

2. The answer to the question of whether a school district is protected by the Eleventh Amendment "depends, at least in part, upon the nature of the entity created by state law." The entity is more like a county or city than an arm of the state and is not entitled to Eleventh Amendment Immunity, even though they are subject to some guidance from the State Board of Education and receive a significant amount of money from the State, (a) if the state law treats "State" differently from "political subdivisions" and "political subdivisions include local school districts; (b) if the entity is but one of many local school boards within the state; and (c) if these entities have extensive powers to issue bonds and to levy taxes within certain restrictions of state law. *Mt. Healthy City School District Board of Education,* 429 U.S. 274, 280-281 (1977).

C. The Ninth Circuit Opinion in this case violates all of the above rules and its final conclusion that a California school district enjoys Eleventh Amendment Immunity and is exempt from the FCA gives California school districts a status of not being accountable for false claims to the government whereas school districts in most other states do not have the protection of the Eleventh Amendment and are subject to the FCA.

1. The *Woods* case, *supra,* points out that the analysis that is required to satisfy the burden an entity has to prove it is covered by the Eleventh Amendment must be made on the specific facts of the case and is not necessarily determined by prior cases having different facts. The Ninth Circuit opinion in this case conflicts with this principal enunciated in *Woods* because here the opinion below relies on two previous Ninth Circuit cases, *Belanger v. Madera Unified School District*, 963 F.2d 248, 254 (9th Cir. 1992) and *Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1996), without even any recognition of the fact differences between the present case and those two cases.

Neither the *Belanger* nor the *Eaglesmith* case involves the False Claims Act or the Individuals with Disabilities Education Act. Instead, both of these cases were brought under 42 U.S.C. § 1983 for wrongful removal from employment. The analysis in *Belanger* centered on California's centralized school funding system. "Under the revenue limit system, state and local revenue is commingled in a single fund under state control, and local tax revenue lost to a judgment must be supplanted by the interchangeable state

funds already in the district budget." *Belanger*, *supra* at 252. *Eaglesmith* followed *Belanger* on this issue without further analysis.

In the instant case, however, we are talking about federal funds, not state funds. These federal funds are excluded from the revenue limit funds that are used in the calculation of the state's contribution to the school budget, California Education Code § 2558(c). In contrast to the state and local funds that the *Belanger* court found were commingled and would therefore result in using state funds to pay any judgment, the federal funds the Institutional Defendants received, as a result of their false claims in this case, can generally not be commingled with state and local funds. 20 U.S.C. § 1412(a)(17)(B), subject to the qualifications in § 1413(a)(4)(A). The Institutional Defendants could pay the judgment by reducing their future federal receipts under the Individuals with Disabilities Education Act. This would not result in the Institutional Defendants receiving additional state funds. Indeed, the California statutes specifically prohibit the state from reimbursing the institutional defendants for any funds withheld from a local educational agency due to the agency's noncompliance with state or federal law. California Education Code § 56845(c).

2. This prohibition that prevents the state from reimbursing the institutional defendants for federal moneys withheld due to their noncompliance with state and federal law assures that the judgment would not be paid from state funds.

3. The California Supreme Court has made clear that the California legislature "has assigned much of the governance of the public schools to the local districts . . . which operate under officials who are locally elected and appointed. . . . The districts

are separate entities for some purposes. . . ." *Butt v. The State of California,* 4 Cal.4th 668, 842 P.2d 1240 (1992) (citations to statutes and cases omitted). "In general, though they act as regulated State agents, local government boards are vested by statute with immediate jurisdiction over day-to-day district affairs . . . . The SPI [State Superintendent of Public Instruction] has important statutory responsibilities for allocating school funds . . . monitoring local budgets. . . and administering the conditions of emergency loans appropriated by the Legislature . . . but no statute grants him emergency powers to operate a local district under other circumstances." *Ibid.* 4 Cal. 4th at 694-695 (citations omitted).

In *Butt,* the California Supreme Court held that the State's ultimate responsibility for the statewide education system made it permissible for the state to take over a school district that was so short of funds that it was going to close on May 1, six weeks short of its scheduled closing on June 14. The facts that there was no statutory authority for this action, and it required a court order to permit the state to take the management of this school away from the local school board, demonstrates that the local boards are not part of the state.

Another California Supreme Court case held that the State Board of Education could not adopt reasonable regulations relating to the use of school buses by school districts that would conflict with the legislature's delegation to school districts of the duty to adopt rules exempting the indigent from transportation fees. While it is true that "the state has ultimate responsibility for the constitutional operation of its schools," this does not support the argument "that the state defendants, who are bound by statutory law,

may take over a function expressly delegated by the Legislature to local districts, in the absence of a court order based on adjudicated constitutional violations" as in *Butt. Salazar v. Eastin,* 9 Cal.4th 836, 858 (1995). This further clarifies the above interpretation of *Butt*, that the local school districts are independent from the state in some respects and are not just arms of the state under the complete control of the Department of Education.

4. As pointed out above, there was no necessary finding that the state would pay a judgment in this case. The court could direct that the judgment be satisfied by the Institutional Defendants not taking their full grants from the federal government under IDEA, possibly over an eight-year period. Cf. *Wells v. One2One Learning Corporation,* 39 Cal.4th 1164, 1195, n. 19 (2006). This would not involve state funds. In fact, the state is prohibited from reimbursing the defendants for these withheld funds. California Education Code § 56845(c).

5. Even the Ninth Circuit cases relating to states other than California, cited above in I.A.5, distinguish *Belanger* on the basis that *Belanger* based its holding on California paying a school district's judgment, which could not be done in this case if the judgment resulted in withholding future federal payments.

6. The amount of state funds used by the Institutional Defendants here (around 20% federal funds, Complaint, paras. 24 and 25, and in *Belanger* (75% state funds) was substantially less than the 98% of the school district funds that came from New Mexico and Alaska in *Duke* and *Holz, supra.*

7. The reference to governmental function of the state in *Belanger* is also contrary to the *Fitchik* statement that the distinction between governmental

and proprietary is no longer a valid criterion.

8. The Ninth Circuit's attempt to distinguish *Regents of the University of California v. Doe,* 519 U.S. 425 (1997) ignores that the question addressed in *Regents* was whether the focus should be on legal rather than financial liability. 519 U.S. at 428. The dissent in the lower court had said: "'The question is not who pays in the end; it is who is legally obligated to pay the judgment that is being sought." *Ibid.* The Supreme Court agreed with this dissent: "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." 519 U.S. at 431.

The Institutional Defendants here are the ones who have the legal liability and whether they can get the State to reimburse them (which they can't) is irrelevant.

9. In short, this case falls within the *Mt. Healthy* definition of school districts that are more like counties or cities than states.

The main point of all these cases is that there are many approaches to determining whether a school district is protected by the Eleventh Amendment. The Tenth Circuit said in adopting the legal liability test, that it "provides a clear and workable test in this very confused area of the law." *Duke, supra,* 127 F.3d at 981. It is now time to clarify the confusion that exists among the various approaches that are used by the circuits. Why should California school districts and Virginia school districts (*Oneill v. Early,* 208 F.2d 286 (4th Cir. 1953); *De Levay v. Richmond County School Board, 284 F.2d 340 (4th Cir. 1960),* enjoy Eleventh Amendment immunity that school districts in most other states do not receive?

II. REFUSING TO LET A QUI TAM PLAINTIFF REPRESENT HIMSELF PRO SE, WITHOUT ANY SHOWING OF INCOMPETENCE OR MISCONDUCT, CONFLICTS WITH TWO SUPREME COURT DECISIONS, TWO DECISIONS IN THE COURTS OF APPEAL, AND IS NOT SUPPORTED BY ANY OTHER COURT OF APPEALS DECISION.

A. The Ninth Circuit Decision Conflicts with both *Vermont Agency of Natural Resources v. United States, ex rel. Stevens,* 529 U.S. 765 (2000) and *Winkelman v. Parma City School district,* 550 U.S. ____, 127 S.Ct. 1994 (2007).

In *Stevens,* the Supreme Court held that the FCA "gives the relator himself an interest in *the lawsuit,* and not merely the right to retain a fee out of the recovery." *Ibid, at 772.* It further said that as a partial assignee of the Government's damages claim, the qui tam plaintiff has standing to assert the injury in fact that is suffered by the assignor.

The statute itself says the qui tam plaintiff may bring a civil action for a violation of the statute "for the person [i.e., the qui tam plaintiff] and for the United States Government." 31 U.S.C. § 3730 (b)(1). This mirrors the original Latin phrase for qui tam actions, which *Stevens* says, "means 'who pursues this action on our Lord the King's behalf **as well as his own.'"** *Stevens,* at 769, n.1 (emphasis added). Moreover, contrary to the Ninth Circuit decision's assertion that "the relator's interest in the lawsuit is limited to certain procedural guarantees," in addition to the bounty authorized by the Act, *Stoner,* at 1127, the FCA guarantees that the qui tam plaintiff "shall

have the right to pursue the action" if the Government elects not to proceed and the same rights in another proceeding if the Government pursues an alternate remedy in a different proceeding. 31 U.S.C. § 3730(c) (3) and (5). Indeed the qui tam plaintiff's interest is a sufficient property interest that states have treated it as divisible community property in a marital dissolution proceeding. *Biddle v. Biddle,* 52 Cal. App.4th 396 (1997); accord, *D.B . v. K.B.*. 176 S.W.3d 3243 (2004).

Since *Stevens* analogized the qui tam plaintiff to an assignee with a partial assignment from the government, cases authorizing an assignee to proceed pro se are appropriate authority. In California, an "assignee may maintain a suit thereon in his own name, even though the assignor retains an equitable interest in the thing assigned." *National Reserve Company of America v. Metropolitan Trust Company of California,* 17 Cal.2d 827, 831 (1941). Even without a state statute like 28 U.S.C. § 1654, California recognizes that the "unique characteristics of the right to self-representation in a civil proceeding establish that this right is indeed the general law of this state." *Baba v. Board of Supervisors of the City and County of San Francisco,* 124 Cal.App.4th 504, 524 (2004).

California law may prohibit an attorney appearing on his own behalf as an assignee for purpose of collection while he is subject to a judgment of disbarment or suspension that is in force, but a former member of the bar who has resigned his membership in the bar may appear on his own behalf in connection with an assignment that was made after his resignation, because the resignation does not connote any misconduct. *Gresham v. The Superior Court of Los Angeles County,* 44 Cal.App. 664 (1941).

Similarly, a person who has not been admitted to the bar can represent himself as an assignee. See *Koepple v. Morrison,* 84 Cal.App. 137,141 (1927).

The Ninth Circuit decision depriving the qui tam plaintiff/petitioner of proceeding *pro se* in the District Court places emphasis on the argument that 28 U.S.C. § 1654 does not authorize a qui tam plaintiff to proceed on behalf of the government, but this conflicts with *Winkelman, supra.* That case makes clear that the question of whether a party may proceed pro se depends only on whether that party has an interest which he represents. Whether his activities benefit another person is irrelevant. The Ninth Circuit overlooked this part of *Winkelman.* Petitioner is not citing *Winkelman* for the proposition that he has an independent interest. That is demonstrated by *Stevens,* the wording of the FCA, and the general recognition that assignees have a sufficient interest in the suits they prosecute to have standing even if another party will benefit from the action. The point of *Winkelman* is that even though the parents' efforts may benefit the child, that does not mean that who is representing the child affects the right they have to represent themselves. Similarly, here, who represents the government should not affect the right of the qui tam plaintiff to represent his own interest which is sufficient to give him standing to prosecute this false claims case.

Thus, the conflict of the Ninth Circuit decision with *Stevens* and *Winkelman* justifies the grant of certiorari under Supreme Court Rule 10 (c).

B. The Ninth Circuit decision conflicts with both *United States ex rel. Kelly v. The Boeing*

***Company*, 9 F.3d 743 (9th Cir. 1993); and *Riley v. St. Luke's Episcopal Hospital*, 252 F.32d 749 (5th Cir. 2001).**

Finally, even though who is representing the Government is irrelevant to the qui tam interest in this case, the Ninth Circuit's reasoning that the qui tam plaintiff is representing the government conflicts with the reasoning used to uphold the constitutionality of the FCA in *United States ex rel. Kelly v. The Boeing Company*, 9 F.3d 743 (9th Cir. 1993); and *Riley v. St. Luke's Episcopal Hospital*, 252 F.32d 749 (5th Cir. 2001). In both of these cases the constitutionality of the FCA was challenged on the ground that the Executive Branch did not retain sufficient control over the litigation. In both of these cases the courts found that the Justice Department did maintain sufficient control to withstand the constitutional challenge. Note that whether the qui tam plaintiff is represented by counsel does not affect this issue. The qui tam plaintiff's counsel is no more under the control of the Justice Department than is the qui tam plaintiff. Nevertheless, the Ninth Circuit says "the United States has little control over the conduct of the action." *Stoner, supra,* at 1128.

The Ninth Circuit's statement that "an unrepresented relator is not transformed into a relator represented by counsel merely because the government has some oversight of the case," *Ibid.*, is not relevant. The relator's interest is covered by 28 U.S.C. § 1654.

It is the Government's interest that is the issue in the constitutional challenge and *Boeing* and *Riley* hold that the Justice Department has sufficient control over the litigation to satisfy the constitutional

requirement. If the Justice Department does not have enough control to protect the Government from the mistakes of a qui tam plaintiff, it does not have enough control to protect the Government from the mistakes of a qui tam plaintiff's lawyer, and the constitutional challenge could throw out the entire False Claims Act, not just its applicability to some school districts.

Thus the conflict of the Ninth Circuit decision with *Boeing* and *Riley* justifies the grant of certiorari under Supreme Court Rule 10 (a).

C. The Ninth Circuit decision prohibiting the qui tam plaintiff from proceeding pro se is not supported by any of the cases cited in the Ninth Circuit Opinion.

The two types of cases the Ninth Circuit cites for the proposition that a qui tam plaintiff cannot proceed pro se are cases (a) where a person does not have a legal interest in the proceeding and the party that would benefit from the action does not have its own lawyers who are receiving the papers that are being filed, or (b) FCA cases where the qui tam plaintiff has demonstrated incompetence or engaged in misconduct and is not a member of the bar of any court in the United States.

Neither of these situations are present here. The government has its own lawyers who receive copies of all pleadings and may intervene if appropriate. The fact that the government appeared as amicus at the court of appeals level shows that they followed what was happening in this case. In contrast to the FCA cases cited by the Ninth Circuit, there was no showing of incompetence or misconduct by the qui tam plaintiff here and he is a member of the bar in Indiana and

of the bar of the Ninth Circuit. In short, contrary to the opinion of the Ninth Circuit, its ruling here is not consistent with the cases it cites.

CONCLUSION

For the above reasons, the Petitioner respectfully requests that the petition for a writ of certiorari be granted to review the Questions Presented in this petition.

Respectfully submitted.

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February 19, 2008

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-15984

John David STONER, individually, United States of America, ex rel. John David Stoner, Plaintiffs-Appellants,
and
The State of California; County of Santa Clara, Plaintiffs,
v.
Santa Clara County Office of Education, East Side Union High School District, Colleen B. Wilcox; Joe Fimiani, David Wong, Defendants-Appellees.

Argued and Submitted May 17, 2007.

Before: Diarmuid F. O'Scannlain and Sandra S. Ikuta, Circuit Judges, and Leonard B. Sand, Senior District Judge for the Southern District of New York, sitting by designation.

502 F.3d 1116 (9th Cir. 2007)

OPINION OF THE COURT

IKUTA, Circuit Judge:

Under the False claims Act ("FCA"), "[a]ny person: who, among other things, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim or payment or approval" is liable to the Government for a civil penalty, treble damages,

and costs. 31 U.S.C. § 3729(a)(1). The FCA authorizes a private person, known as a relator, to bring a *qui tam* civil action "for a violation of section 3729 for the person and for the United States Government . . . . in the name of the Government." 31 U.S.C. § 3730(b)(1). This case requires us to decide whether a *pro se* relator may bring a *qui tam* action in federal court on behalf of the government against various actors in the California school system.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCDEDURAL BACKGROUND

Appellant John David Stoner brought this *qui tam* action in the United sates District Court for the Northern District of California against the Santa Clara County Office of Education ("SCCOE"), his former employer, the East Side Union High School District ("ESUHSD"), and three SCCOE employees, Colleen Wilcox, Joe Fimiani, and David Wong. In the proceedings before the district court, Stoner appeared *pro se*. Although Stoner is a licensed attorney, and has been admitted to practice before this court, *see* Fed.R.App.Proc. 46(a), he is not a member of the State Bar of California, and consequently could not be admitted to membership before the district court for the Northern District of California, see Northern District of California, Civil Local Rule 11-1. Stoner's complaint alleged that defendants presented various fraudulent claims for payment or approval to the United States in violation of the False Claims Act

("FCA"). Specifically, he claimed that de[*1120] fendants falsely certified compliance with the Individuals with Disabilities Education Act to induce the government to disburse more money for certain educational programs. Stoner's complaint also raised a number of state law claims, including alleged violations of the California False Claims Act.

As required by the FCA, Stoner filed his complaint under seal and served it on the United States. *See* 31 U.S.C. § 3730(b)(2). After the United States declined to intervene, the complaint was unsealed and served on the SCCOE. The SCCOE immediately moved to dismiss the claims against it, arguing, among other things, that it was not a "person" subject to liability under the FCA. The remaining defendants joined in that motion.

The district court granted the motion to dismiss after determining that the complaint failed to state a claim under the FCA. *See* Fed.R.Civ.P. 12(b)(6). The court held that the FCA did not provide a cause of action against the SCCOE and the ESHSD because each entity is a state agency, and thus not a "person" subject to liability under the FCA. *See Vt. Agency of Natural Res. V. United States ex rel. Stevens,* 529 U.S. 765, 787-88, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (holding that the FCA does not subject a state or state agency to liability in a *qui tam* action brought by a private relator). Relying on *United States ex rel. McVey v. Board of Regents of the University of California,* 165 F.Supp.2d 1052, 1058-59 (N.D. 2001), the court also held that Stoner could not sue the individual SCCOE employees in their personal capacities under the FCA for actions committed in the course of their official responsibilities. In addition, the court *sua sponte*

raised the issue of Stoner's authority to prosecute a *qui tam* action on behalf of the United States in *propria persona* and held that Stoner could not proceed *pro se*[1] on the FCA claims. The court then declined to exercise supplemental jurisdiction over Stoner's remaining state law claims and dismissed Stoner's complaint in its entirety. Stoner filed this timely appeal. *See Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912, 923 (9th Cir. 2001) (noting that a motion to dismiss becomes a final appealable order within the meaning of 28 U.S.C. § 1291 when the district court order disposed of all claims against all parties).[2]

STANDARDS OF REVIEW

"A dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo." *Marder*, 450 F.3d at 448. "All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the plaintiff.

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[1] The phrases in propria persona and pro se are synonymous. See Black's Law Dictionary 1256 (8th ed.2004); see also Savage v. Estelle, 924 F.2d 1459, 1460 n. 1 (9th Cir. 1990) ("no legal distinction" between the phrases in the context of self-representation).

[2] Prior to oral argument in this case, Stoner filed a request for judicial notice of certain documents not part of the record on this appeal. The defendants oppose Stoner's request on the grounds that the documents submitted are unauthenticated, lack foundation, and do not satisfy the requirements of Rule 201 of the Federal rules of Evidence. Because the documents at issue do not fall within the narrow exception to the general rule that the scope of this court's review on a motion to dismiss for failure to state a claim is limited to the contents of the complaint, see Marder v. Lopez, 450 F.3d 445t, 448 (9th Cir. 2006), Stoner's request for judicial notice is denied.

Dismissal of the complaint is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief." *McGary v. City of Portland,* 386 F.3d **[*1121]** 1259, 1261 (9th Cir.2004) (internal citation omitted).

Questions of statutory interpretation and the existence of sovereign immunity are also reviewed de novo. *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1213 (9th Cir. 1996); *United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1144 (9th Cir.2004).

DISCUSSION

We first address the question whether school districts in California, including county offices of education, are subject to *qui tam* liability under the FCA. We begin our analysis with the language of the statute itself. The FCA subjects to liability any "person" who, among other things, "knowingly presents, or causes to be presented, to an officer of employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). Section3729 does not define the term "person." However, *Stevens* held that a state or state agency is not a "person" for purposes of § 3729 and therefore, not subject to liability in *qui tam* suits brought by private parties. 529 U.S. at 787-88, 120 S.Ct. 1858.

In light of *Stevens'* holding, we must determine whether the SCCOE, a California county office of education, and the ESUHSD, a California school district, are state agencies. Although we have not yet considered this issue in the context of the FCA,

we previously determined that a California school district, and county office of education were state agencies for purposes of Eleventh Amendment sovereign immunity. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir.1992); *Eaglesmith v. Ward,* 73 F.3d 857, 860 (9th Cir.1996). The district court looked to these cases in ruling that neither the SCCOE nor the ESUHSD was a "person" within the meaning of 31 U.S.C. § 3729.

We agree with the district court's approach. As explained below, *Stevens* teaches that our Eleventh Amendment case law should guide our determination of whether an entity is a state agency and thus not a "person" for purposes of § 3729. *Stevens'* analysis of the word "person" in § 3729 was driven by canons of statutory construction relating to protection of the state's sovereign immunity. *See Stevens,* 529 U.S. at 781-87, 120 S.Ct. 1858. Specifically, *Stevens* based its holding that neither a state nor a state agency were "persons" within the meaning of § 3729 on the following canons of statutory construction related to state sovereignty: (1) the presumption that the term "person" does not include the sovereign, *id.* at 780, 120 S.Ct. 1858; (2) the rule that Congress must clearly state its intention to subject states to liability, *id.* at 781-82, 787, 120 S.Ct. 1858; (3) the presumption against imposition of punitive damages on governmental entities, *id.* at 784-85, 120 S.Ct. 1858; and (4) "the ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute," *id.* at 787, 120 S.Ct. 1858. Applying these cannons, the Court observed

that "far from providing the requisite affirmative indications that the term 'person' included States for purposes of *qui tam* liability," Congress expressed a contrary intent. *Id.* This conclusion was buttressed by "the doctrine that statutes should be construed so as to avoid difficult constitutional questions." *Id.* With respect to this last point, the Supreme Court explained that there was a "'serious doubt'" on the question whether an action in federal court by a *qui tam* relator against a state or a state agency would be consistent with the Elev[***1122**]enth Amendment, *id.* (quoting *Ashwander v. TVA*, 297 US. 288, 348, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring)), although the Court was careful to "express no view" on this issue. *Id.* In effect, the Court presumed that in enacting the FCA, Congress intended not to infringe on a state's sovereign immunity and therefore did not make states subject to suit under the FCA.

To effectuate Congress's presumed intent, we must interpret the term "person" under § 3729 in a way that avoids suits against "state instrumentalities" that are effectively arms of the state immune from suit under the Eleventh Amendment. *See also Will v. Mich. Dep't of State Police,* 491 U.S. 58, 70, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (instructing lower courts to refer to the Eleventh Amendment arm-of-the-state analysis in determining whether an entity is an agency of the state and thus not a "person" for purposes of 42 U.S.C. § 1983 (citing *Mt. Healthy Bd. of Educ. v. Doyle,* 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977))). Our conclusion that we must rely on our Eleventh Amendment jurisprudence to determine whether an entity is a "person" within the meaning of §3729 is further underlined by our post-*Stevens*

holding that states and state agencies enjoy sovereign immunity from liability under the FCA" *Bly-Magee v. California,* 236 F.3d 1014, 1017 (9th Cir.2001); *see also United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall,* 355 F.3d 1140, 1145 (9th Cir.2004). Both *Bly-Magee and Ali* implicitly recognize that Eleventh Amendment principles guided the Supreme Court's decision in *Stevens.*

We thus look to our Eleventh Amendment case law in determining whether the SCCOE and the ESUHSD are state agencies not subject to FCA liability under *Stevens.* We have held that a California school district and county office of education are arms of the state for purposes of Eleventh Amendment sovereign immunity. *Belanger,* 963 F.2d at 254; *Eaglesmith* 73 F.3d at 860. Accordingly, we must conclude that neither the SCCOE nor the ESUHSD is a "person" subject to liability under § 3729 of the FCA. *Stevens,* 529 U.S. at 781-87, 120 S.Ct. 1858. By the same reasoning, Stoner's *qui tam* action against the SCCOE and the ESUHSD is barred by the Eleventh Amendment. *Ali,* 355 F.3d at 1145; *Bly-Magee*, 236 F.3d at 1017.

Stoner asks us to revisit *Belanger* and *Eaglesmith* in light of *Regents of the University of California v. Doe*, 519 U.S. 425, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997), which was decided by the Supreme Court five years after *Belanger.* He contends that after *Regents*, a state agency is not shielded by the state's sovereign immunity unless the state is directly liable for any money judgment rendered against the agency. We disagree. *Regents* holds that the Eleventh Amendment may bar a lawsuit against a state agency in circumstances where the state is legally liable for a judgment against that agency, even if the state is

indemnified against that liability by a third party. *Id.* at 426, 117 S.Ct. 900. But nothing in *Regents* requires us to depart from the well-established Eleventh Amendment principle that a governmental entity may be an arm of the state protected by sovereign immunity where the state is functionally liable, even if not legally liable, on money judgments against the state entity. *See, e.g., Hess v. Port Auth. Trans-Hudson Corp.* 513 U.S. 30, 50, 115 S.Ct. 394, 130 L.Ed.2d 245 (1990) ("Where an agency is so structured that as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity at**[*1123]**tach to the agency." (internal quotation marks omitted)); *Lake Country Estates, Ind. v. Tahoe Reg'l Planning Agency,* 440 U.S. 391, 401, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979) (The Eleventh Amendment "protect[s] the state treasury from liability that would have had *essentially the same practical consequences* as a judgment against the State itself." (emphasis added)). In decisions issued after *Regents*, we held that California school districts and county offices of education are entitled to the state's Eleventh Amendment immunity, due in part to their statutorily mandated relationship with the state, which (among other things) makes the state treasury unconditionally liable to make up any budgetary shortfall encountered by either entity as a result of an adverse judgment. *See Beentjes v. Placer County Air Pollution Control Dist.,* 397 F.3d 775, 780-81 (9th Cifr.2005); *Holz v. Nenana City Pub. Sch. Dist.,* 347 F.3d 1176, 1183 (9th Cir.2003); *Savage v. Glendale Union High Sch. Dist. No, 205,,* 343 F.3d 1036, 1042 (9th Cir.2003); *Eason v. Clark County Sch.*

Dist., 303 F.3d 1137, 1142 (9th Cir.2002). These cases make clear that *Belanger* and *Eaglesmith* remain binding authority of this circuit following *Regents.*

Following Belanger and *Eaglesmith,* therefore, we hold that the SCCOE and the ESUHSD are arms of the state, and therefore not "persons" subject to *qui tam* liability under the FCA. Stoner thus has no statutory authority to bring an FCA claim against the SCCOE and the ESUHSD. *See* 31 U.S.C. § 3729(a); *Stevens,* 529 U.S. at 787-88, 120 S.CT. 1858. By the same token, the Eleventh Amendment poses an independent bar to *qui tam* action against either entity. *Bly-Magee,* 236 F.3d at 1017. Accordingly, the district court properly dismissed Stoner's FCA claims against both entities.

II.

We next turn to the district court's dismissal of the FCA claims asserted against the three individual SCCOE employees named in Stoner's complaint. While Stoner's complaint does not specify the capacity in which he was suing Wilcox, Fimiani, and Wong, "[t]he course of proceedings" in this case indicates that Stoner was suing these employees in their individual, as well as official capacities. *See Kentucky v. Graham,* 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) ("In many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both. 'The course of proceedings' in such cases typically will indicate the nature of the liability sought to be imposed." (quoting *Brandon v. Holt,* 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985))). With respect to the official capacity claims, the district court held that the individually named defendants could not be sued for damages in their

official capacities because such a suit would, in effect, be against the state. *See Will,* 491 US. At 71, 109 S.Ct. 2304 (concluding that a state official sued in his or her official capacity for money damages is not a "person" subject to suit under 43 U.S.C. § 1983 because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office," and for this reason "is no different from a suit against the State itself"). The parties do not challenge this ruling and we express no opinion on the merits of the district court's conclusion.

The district court also held that Stoner failed to state an FCA claim against the individual defendants in their personal capacities because Stoner could not allege that the defendants' actions exceeded the scope of their official responsibilities. As explained below, this was an **[*1124]** error. The plain language of the FCA subjects to liability "any person" who, among other things, knowingly submits a false claim or causes such a claim to be submitted to the United States. 31 U.S.C. § 3729. Although the FCA does not define the term "person," the Supreme Court has made clear that the term includes "natural persons." *Cook County v. United States ex rel. Chandler,* 538 U.S. 119, 125, 123 S.Ct. 1239, 155 L.Ed.2d 247 (2003); *see also* 1 U.S.C. § 1 (defining the term "person" for purposes of "determining the meaning of any Act of Congress" as including an individual). Therefore, state employees sued in their personal capacities are "persons" who may be subject to liability for submitting a false claim to the United States. *Cf. Hafer v. Melo,* 502 U.S. 21, 27, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) (concluding, in context of case filed pursuant to 42 U.S.C. 1983, that "[a] government official in the role of personal-

capacity defendant . . . fits comfortably within the statutory term 'person'").

To state a claim against Wilcox, Fimiani, and Wong in their personal capacities, Stoner need show only that the individual employees "knowingly present[ed], or cause[d] to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). Stoner's complaint alleged that Wilcox, Fimiani, and Wong knowingly presented or caused to be presented false or fraudulent statements to the United States Department of Education to obtain federal funds for various educational programs. If true, these allegations are sufficient to state a claim for personal liability under 31 U.S.C. § 3729(a)(1). Stoner need not allege that the individual defendants personally profited from such false submissions. Nothing in § 3729(a)(1) requires the person knowingly making a false submission to obtain a personal benefit from the wrongful act.

In dismissing the FCA claims against Wilcox, Fimiani, and Wong, the district court relied on *McVey,* 165 F.Supp.2d at 1058-59, which held that "[u]nder the FCA, a state official is immune from suit for actions taken in his position," even where it is alleged that the official abused his authority. *Id.* at 1059; *see also United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa,* 269 F.3d. 932, 937 (8th Cir.2001) (holding that state official could not be sued under the FCA in his individual capacity unless he was acting "outside his official duties" when he took the action alleged to violate the FCA (quoting *Bly-Magee,* 236 F.3d at 1016)). We disagree with *McVey* and *Gaudineer* to the extent the reasoning of these cases cannot be reconciled with the

plain language of the statute.

Our conclusion is supported by the Supreme Court's decision in *Hafer,* which rejected the argument that state officials may not be held personally liable under 42 U.S.C. § 1983 for action taken in their official capacities. 502 US. At 27-31, 112 S.Ct. 358. The Court reasoned that to hold otherwise would, in effect, "absolutely immunize state officials from personal liability for acts within their authority and necessary to fulfilling governmental responsibilities." *Id.* at 28. The Court noted that such absolute immunity extends only to a very limited class of officials, "including the President of the United states, legislators carrying out their legislative functions, and judges carrying out their judicial functions." *Id.* at 29, 112 S.Ct. 358 (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 807, 102 S.CT. 2727, 73 L.Ed.2d 396 (1982).

Hafer's reasoning is equally applicable to our interpretation of the FCA. The individual defendants named in Stoner's complaint do not fall into the narrow class of officials entitled to absolute immunity. **[1125]** Were we to interpret § 3729 to preclude an action against state officials in their personal capacities, our holding would be tantamount to a grant of absolute immunity under the FCA to state officials for any action taken in the course of their governmental responsibilities. *See Hafer,* 502 at 27-29, 112 S.Ct. 358. Such an interpretation finds no support in the statutory language. It is also contrary to the principles of the Supreme Court's well-established public employee immunity jurisprudence. *Id.* at 29, 112 S.Ct. 358 (citing *Harlow,* 457 U.S. at 807, 102 S.Ct. 2727); *see also United States ex rel. Burlbaw v. Regents of N.M. State Univ.,* 324 F.Supp.2d 1209, 1215

(D.N.M.2004). We decline to adopt an interpretation of § 3729 that is at odds with the statutory language and clear guidance from the Supreme Court. We therefore hold that state employees may be sued in their individual capacities under the FCA for actions taken in the course of their official duties.[3]

The individual defendants challenge this straightforward conclusion contending that it permits an end-run around *Stevens* and the Eleventh Amendment. They argue that a relator precluded from asserting a *qui tam* action against a state agency could bring the same action against individual state employees in their personal capacity. We find this argument unpersuasive. An individual capacity suit for damages against state officials alleged to have personally violated § 3729 does not implicate the principles of state sovereignty protected by *Stevens* and our Eleventh Amendment jurisprudence because such an action seeks damages from the individual defendants rather than the state treasury. *See Alden v. Maine*, 527 U.S. 706, 757, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). Nor does the fact that a state may choose to indemnify the employees for any judgment rendered against them bring the Eleventh Amendment into play. *See Demery v. Kupperman*, 735 F.2d 1139. 1147-1148 (9th Cir.1984) (state may not impart sovereign immunity, and thereby prevent vindication of federal rights in federal court, by adopting an indemnification policy.) As the Supreme Court explained, "the distinction

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[3] Of course, state employees sued under the FCA may be entitled to qualified immunity. Any personal immunity defenses that may be available to Wilcox, Fimiani, and Wong, including the defense of qualified immunity, are not before us in this stage of the proceedings where the defendants have not yet filed an answer.

between official-capacity suits and personal-capacity suits is more than 'a mere pleading device.'" *Hafer,* 502 U.S. at 27, 112 S.Ct. 358 (quoting *Will,* 491 U.S. at 71, 109 S.Ct. 2304). Where a plaintiff seeks to hold individual employees personally liable for their knowing participation in the submission of false or fraudulent claims to the United States government, the state is not the real party in interest, *see Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 101, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), and the Eleventh Amendment poses no barrier to such a suit. *Hafer,* 502 U.S. at 30-31, 112 S.Ct. 358.

To summarize, we hold that state officials, sued for damages in their individual capacities, are "persons" within the meaning of 31 U.S.C. § 3729. The Eleventh Amendment does not bar such suits. Accordingly the district court erred in holding that Stoner had failed to state a claim under § 3729 against Wilcox, Fimiani, and Wong, in their personal capacity.

III.

Finally, we must address the district court's determination that Stoner could not proceed *pro se* on this FCA action. As noted above, although Stoner is an attorney, he was not a member admit**[*1126]**ted to practice before the district court as a matter of the court's local rules. It has long been established that an individual wanting to prosecute or defend an action in federal court must be represented by a lawyer admitted to practice before that court, unless such individual is permitted to proceed *pro se* under 28 U.S.C. § 1654 or other federal law, *see C.E. Pope Equity Trust v. United States,* 818 F.2d 696, 697-98 (9th Cir.1987), or is himself an attorney granted *pro hac vice* permission. Stoner

did not secure *pro hac vice* admission, but sought to proceed *pro se*. The general *pro se* provision set forth in 28 U.S.C. § 1654 provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . ." While this provision allows Stoner to prosecute his own actions *in propria persona,* that right is personal to him, and absent some other statutory authorization, Stoner has no authority to prosecute an action in federal court on behalf of others than himself. *C.E. Pope Equity Trust,* 818 F.2d at 697.

However, this is exactly what Stoner seeks to do. Stoner has brought this action pursuant to 31 U.S.C. § 3730(b)(1), which provides that a "person," known as the relator, "may bring a civil action for a violation of section 3729 for the person *and for the United States Government* . . . in the name of the Government." 31 U.S.C. § 3730(b)(1) (emphasis added). As this court has explained, "the entire purpose of the FCA's *qui tam* provisions is to employ the help of individuals to uncover fraud agasint the government." *United States ex rel. Kelly v. Boeing Co.,* 9 F.3d 743, 748 (9th Cir.1993). To this end, the FCA motivates "a private individual[to] bring suit in federal court *on behalf of the United States"* by effecting a partial assignment of the government's damages claim to the relator. *Stevens,* 529 U.S. at 768, 120 S.Ct. 1858 (emphasis added).

Although the partial assignment allows the relator asserting the government's injury to satisfy the requirements of Article III standing, it does not transform a *qui tam* action into the relator's "own case" for purposes of § 1654. The FCA makes clear that notwithstanding the relator's statutory right to

the government's share of the recovery, the underlying claim of fraud always belongs to the government. *See* 31 U.S.C. § 3730(e)(5) (providing that "the Government may elect to pursue *its claim* through any alternate remedy" (emphasis added)). Accordingly, where the government chooses not to intervene, a relator bringing a *qui tam* action for a violation of § 3729 is representing the interests of the government and prosecuting the action on its behalf. *See* 31 U.S.C. § 3730(b)(1); *see also United States v. Schimmels (In re Schimmels),* 127 F.3d 875, 882 (9th Cir.1997) ("[T]he 'United States is the real party in interest in any False Claims Act suit, even when it permits a *qui tam* relator to pursue the action on its behalf.'" (quoting *United States ex rel. Milam v. Univ. Of Tex. M.D. Anderson Cancer Ctr.,* 961 F.2d 46, 50 (4th Cir.1992); *Kelly,* 9 F.3d at 743 ("The express language of the FCA gives relators the right to bring suit *on behalf of the government."* (emphasis added)). Nor does the FCA "support a finding that the government and the relators can pursue their interests . . . separately," *Schimmels,* 127 F3d at 884, such that relators could bring their "own case" without binding the government. Rather, the United States "is bound by the relator's actions" for purposes of res judicata and collateral estoppel. *Id.; see also United States ex rel. Rockefeller v. Westinghouse Elect. Co.,* 274 F.Supp.2d 10, 16 (D.D.C.2003); *United States ex rel. Schwartz v. TRW Inc.,* 118 F.Supp.2d 991, 996 (C.D.Cal.2000). Because *qui tam* relators are not prosecuting only their "own **[1127]** case" but also representing the United States and binding it to any adverse judgment the relators may obtain, we cannot interpret § 1654 as authorizing *qui tam* relators to proceed *pro se* in FCA actions.

Because the general *pro se* provision, 28 U.S.C. § 1654, does not authorize Stoner to proceed *pro se* on behalf of the government, Stoner must identify an alternate source of authority granting him this privilege. This Stoner has failed to do. The FCA itself does not authorize a relator to prosecute a § 3729 violation *pro se*. While the FCA gives a relator the "right to conduct the action." 31 U.S.C. § 3730(c)(3), Stoner can point to no language enabling a relator to conduct the action without a licensed attorney. Given the fact that Congress did not expressly authorize a *qui tam* relator to proceed *pro se* when acting on behalf of the United states, it "must have had in mind that such a suit would be carried on in accordance with the established procedure which requires that only one licensed to practice law may conduct proceedings in court for anyone other than himself." *United States v. Onan*, 190 F.2d 1, 6 (8th Cir.1951).

The Supreme Court's recent decision in *Winkelman v. Parma City School District*, ___ U.S. ___ , 127 S.Ct. 1994, 167 L.Ed.2d 904 (2007), does not suggest a contrary conclusion. *Winkelman* considered whether the parents of a child covered by the Individuals with Disabilities Education Act ("IDEA") could proceed *pro se* in federal court to enforce IDEA's guarantee of a free appropriate public education for their child, *Id.* at 2000-05. The central question in *Winkelman* was whether IDEA grants parents the same independent substantive right to a free appropriate public education as it does their child, and thus whether unrepresented parents would be proceeding on their own behalf or on behalf of their child in an action to enforce this right in federal court. *Id.* at 1998. After examining IDEA's statutory scheme, the court held that the parents

could bring such an action *pro se* pursuant to 28 U.S.C. § 1654 because IDEA gives the parents their own "independent, enforceable" right to the substantive adequacy of their child's education. *Id.* at 2005.

While *Winkelman* reaffirms that *pro se* plaintiffs are entitled to enforce their own independent rights in federal court under § 1654, it has no direct application here because the FCA makes clear that a relator brings a *qui tam* suit on behalf of the government. Unlike IDEA, which allows parents to proceed on their own behalf to vindicate the substantive right to a free appropriate public education for their child, the substantive right underlying the FCA action is the government's right not to be defrauded. *See Stevens*, 529 U.S. at 771, 120 S.Ct. 1858 (The relator "is suing to remedy an injury in fact suffered by the United States."). The relator's interest in the lawsuit is limited to certain [procedural guarantees, in addition to the "bounty" the relator will receive for successfully assisting the government in vindicating the government's substantive rights. *See Stevens*, 529 U.S. at 772, 120 S.Ct. 1858. Stoner's reliance on *Winkelman* in the context of the FCA is thus misguided.

Our conclusion that a *pro se* relator cannot prosecute a *qui tam* action on behalf of the United states is consistent with the decisions of other circuits to have addressed the issue. *See United states ex rel. Lu v. Ou*, 368 F.3d 773, 775-76 (7th Cir.2004); *see also Safer v. Blackwell*, 579 F.2d 742, 745 n. 4 (2d Cir.1978); *United States v. Onan*, 190 F.2d 1, 6 (8th Cir.1951).

In an effort to distinguish these cases, Stoner argues that he is not truly proceeding *pro se* because the FCA grants the government a degree of oversight over the action, *see* 31 U.S.C. **[1128]** § 3730(c)(3). We

are not persuaded. Unless it intervenes or moves to dismiss, the United states has little control over the conduct of the action. *See generally* 31 U.S.C. § 3730. For purposes of 28 U.S.C. § 1654, an unrepresented relator is not transformed into a relator represented by counsel merely because the government has some oversight of the case. The strong policy considerations underlying the general rule that parties may not represent the interests of others in federal court support our conclusion that the government's minimal oversight does not overcome Stoner's *pro se* status. In cases as complicated as *qui tam* actions, a licensed attorney is best equipped to present the complex legal and factual issues involved and "[a] federal court rightly expects a lawyer to represent a litigant." *C.E. Pope Equity Trust,* 818 F.2d at 697.

We therefore agree with the district court that Stoner is not entitled to proceed *pro se* in his action. In the dismissal order from which this case arises, the district court ruled that Stoner would be given a period of time in which to secure counsel if this action otherwise survived the defendants' motion to dismiss. Because we conclude that Stoner has stated a claim under the FCA against the individual defendants, we remand this case to the district court with instruction to give Stoner reasonable time to find counsel or, in the alternative, obtain *pro hac vice* admission. If Stoner fails to retain counsel or obtain *pro hac vice* admission, the district court should dismiss this action, without prejudice to the government.

IV.

For the reasons discussed above, we reverse the district court's ruling dismissing the FCA claims against the individual defendants named in Stoner's complaint.[4] We otherwise affirm the rulings of the district court. We remand this case for further proceedings consistent with this opinion. Each party shall bear its own costs on appeal. *See* Fed.R.App.P. 39(a)(4).

AFFIRMED in part; **REVERSED** in part; **REMANDED.**

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[4] The defendants also contend that Stoner's complaint fails to allege an actionable false certification upon which federal funding was conditioned. *See United States ex rel. Hopper v. Anton,* ("Violations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit."). The district court did not address this argument and we decline to resolve it here without giving the district court the opportunity to do so in the first instance. *See Foti v. City of Menlo Park,* 146 F.3d 629, 638 (9th Cir.1998) ("Generally, we do not consider an issue not passed upon below." (internal quotation marks omitted)).

APPENDIX B

Unreported Order Granting Defendants'/ Respondents' Motion to Dismiss for Failure to State a Claim and for Lack of Subject Matter Jurisdiction Filed March 8, 2004 and Entered on 3/9/04

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NNORTHERN DISTRICT OF
CALIFORNIA
SAN JOSE DIVISION

The United States of America et al., ex rel. John David Stoner,

Plaintiff(s),

v.

Santa Clara County Office of Education et al.

Defendants

_____/

NO. C 03-04622 JW

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CALAIM AND FOR LACK OF SUBJECT MATTER JURISDICTION

Docket No. 11

I. INTRODUCTION

This is a *qui tam* action. Plaintiff John Stoner, *in pro per,* filed this action on behalf of himself, the United States, and the State of California (collectively "Stoner) against the Santa Clara County Office of Education ("SCCOE"), the East Side Union High School District ("ESUHSD") and three SCCOE employees. Stoner alleges violations of the Federal and California False Claims Acts and asserts other related state claims. Defendant SCCOE has moved to dismiss all of Stoner's claims for failure to state a claim, lack of subject matter jurisdiction, and lack of supplemental jurisdiction. Based upon the papers filed to date and the argument of counsel, the SCCOE's motion is GRANTED. [*2]

II. BACKGROUND

Stoner worked as a teacher at the SCCOE's Foothill Pilot Program from December 21, 2001 through June 30, 2003. In 2003, Stoner was not re-elected to his position and his employment was terminated on June 30. During his employment with the SCCOE, Stoner alleges that all defendants were involved in submitting false claims to the United states and the State of California in order to obtain funding for certain educational programs. Stoner apparently complained about these activities to his employer, but nothing was resolved and he was eventually terminated.

On October 17, 2003, Stoner filed this action against defendants alleging eleven claims for relief. Stoner's first three claims are made on behalf of himself and the United States under the False Claims Act ("FCA"). Stoner's fourth, fifth, and sixth claims are made on

behalf of himself and the State of California under the California False Claims Act ("CFCA"). His seventh claim for relief is made solely on behalf of himself under the CFCA's whistleblower provision. The remainder of Stoner's eleven claims involve contract and employment related claims against the SCCOE and its employees.

After filing this action, Stoner contacted the U.S. Attorney General, the California Attorney General, and the Santa Clara County Counsel regarding participation in this dispute. All government offices declined to intervene. Stoner was permitted to proceed *qui tam* on behalf of the United States and California against the defendants.

The SCCOE was the only defendant served at the time its motion was filed. Recently, the SCCOE's counsel accepted service for the remaining defendants the ESUHSD and SCCOE employees Colleen Wilcox, Joe Fimiani, and David Wong. Presently before the Court is the SCCOE's motion to dismiss Stoner's first seven FCA/CFCA claims either for failure to state claim or for lack of subject matter jurisdiction. In addition, the SCCOE has moved to dismiss the remainder of Stoner's state claims for lack of supplemental jurisdiction if the Court first dismisses all the federal claims. Since all defendants are now commonly represented and SCCOE's motion to dismiss equally applied to the other defendants, the Court will include the other defendants in its [*3] ruling on SCCOE's motion to dismiss.

III. STANDARDS

A. Federal rule of Civil Procedure 12(b)(1)

Rule 12(b)(1) allows a party to challenge a federal

court's jurisdiction over the subject matter of the complaint. A complaint will be dismissed if, looking at the complaint as a whole, it appears to lack federal jurisdiction either facially or factually. *See Thornhill Publ'g Co., Inc. v. General Tel. & Elec. Corp.,* 594 F.2d 730, 733 (9th Cir. 1979). In considering a motion to dismiss for lack of subject matter jurisdiction, the court must accept all of plaintiff's factual allegations as true. *See Dreier v. United States,* 106 F.3d 844, 847 (9th Cir. 1997).

B. Federal Rule of Civil Procedure 12(b)(6)

In ruling on a motion to dismiss, the court must accept as true all allegations of material fact and must construe said allegations in the light most favorable to the non-moving party. *Western Reserve Oil & Gas Co. v. New,* 765 F.2d 1428, 1430 (9th Cir. 1985). Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enterprises,* 476 F.2d 393, 396 (9th Cir. 1973).

A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts stated under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530, 533-34 (9th Cir. 1984). In order to grant a motion to dismiss, it must appear to a certainty that a plaintiff would not be entitled to relief under any set of facts which could be proved. *Wool v. Tandem Computers, Inc.,* 818 F.2d 1433, 1439 (9th Cir. 1987).

IV. DISCUSSION

Under the FCA, "any person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a

false or fraudulent claim for payment or approval," is liable to the Government for a civil penalty, treble damages, and costs. 31 U.S.C. § 3729(a)(1). Although the Attorney General may sue under the FCA, a private person, known as a relator, may also bring a *qui tam* action "in the name of the Government." *Id.* at § 3730(b). The [*4] relator must inform the Justice Department of his intentions and keep the pleadings under seal while the Government decides whether to intervene and do its own litigating. *Id.* at § 3730(b)(2). If the claim succeeds, the relator's share may be up to 30 percent of the proceeds of the action, plus reasonable expenses, costs, and attorney's fees. *Id.* at § 3730(d).

The CFCA, Cal.Gov. Code § 12650 *et seq.* was enacted in 1987 and is patterned largely on its federal counterpart the FCA. *American Contract Services v. Allied Mold & Die, Inc.* 94 Cal. App. 4th 854, 858 (2001). The Act is designed to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities by authorizing private parties, referred to as *qui tams* or relators, to bring suit on behalf of the State of California. *Id.* The ultimate purpose of the Act is to protect the public fisc. *Id.* As such, the Act must be construed broadly so as to give the widest possible coverage and effect to its prohibitions and remedies. *LeVine v. Weis,* 90 Cal. App. 4th 201,210 (2001). Under the CFCA, a party who knowingly presents a false claim to a public entity to induce it to pay is liable for treble the damages sustained by the entity, plus costs attorney fees and a maximum fine of $10,000 for each false claim. Cal. Gov. Code § 12651(a)(1)-(2). Damages may also be assessed against any party who benefits

from the inadvertent submission of a false claim if the party, after learning of the claim's falsity, fails to disclose it to the public entity within a reasonable time. *Id.* at § 12651(a)(8). The relator must inform the Attorney General of his intentions and keep the pleadings under seal while the Government decides whether to intervene and do its own litigating. *Id.* at § 12651(c)(2)-(4). If the claim succeeds, the relator's share may be up to 50 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. *Id.* at § 12652(g)(3),

Relator Stone's [sic] first three claims seek relief under the FCA, and his fourth, fifth, sixth, and seventh claims seek relief under the CFCA. The SCCOE has moved to dismiss these seven claims under Rule 12(b)(6) on the grounds that: (1) the SCCOE is not a proper party under either the FCA or the CFCA, and (2) failed to exhaust all his administrative remedies under Cal. Gov. Code § 12654(d)(4). In addition, the SCCOE has moved to dismiss Stoner's entire complaint for lack of **[*5]**subject matter jurisdiction, under Rule 12(b)(1), on the grounds that: (1) the SSCOE [sic] is immune from suit under either the FCA or the CFCA pursuant to the Eleventh Amendment to the U.S. Constitution, and (2) this Court lacks supplemental jurisdiction over Stoner's remaining state claims. The Court addresses SCCOE's arguments below and, *sua sponte,* raises the issue of whether Stoner can represent the United States in this action *in pro per.*

A. Only one who his [sic] licensed to practice laws can represent the United States in a *qui tam action.*

The Court, *sua sponte,* first raises the issue of

whether Stoner, proceeding *in pro per,* can represent the United States in a *qui tam* action. The Court finds that he cannot. It is axiomatic that a non-lawyer may not represent any person or entity other than himself. *Rowland v. California Men's Colony,* 506 U.S. 194, 201-03 (1993) (listing cases holding that non-lawyers may not represent partnerships or corporations in federal court); *Johns v. County of San Diego*, 113 F.3d 874, 876 (9th Cir. 1997) ("[a] guardian or parent cannot bring suit on behalf of a minor in federal court without retaining a lawyer"); *In re America West Airlines,* 40 F.3d 1058, 1059 (9th Cir. 1994) (per curiam) (holding that a non-attorney may not appear on behalf of a partnership); *United States v. High Country Broadcasting Co.,* 3 F.3d 1244, 1245 (9th Cir. 1993) (per curiam) (non-lawyer sole shareholder may not represent corporation and was properly precluded from intervening and representing himself where his "interest [were] identical to the corporation's"); *C.E. Pope Equity Trust v. United States,* 818 F.2d 696, 698 (9th Cir. 1987) (non-lawyer trustee may not appear for trust); Phillips v. Tobin, 548 F.2d 408, 413-15 (2d Cir. 1976) (pro se litigant may no bring shareholders' derivative action). As the Eighth Circuit Court of Appeals has noted,

> we do not think that Congress could have intended to authorize a layman to carry on [a *qui tam* action under the False claims Act] as attorney for the United States but must have had in mind that such a suit would be carried on in accordance with the established procedure which requires that only one licensed to practice law may conduct proceedings in court for anyone

other than himself.

United States v. Onan, 190 F.2d 1, 6 (8th Cir.), *cert. denied,* 342 U.S. 869, 96 L.Ed. 654, 72 S.Ct. **[*6]** 112 (1951). At the March 1, 2004 hearing on SCCOE's motion to dismiss, Stoner admitted that while he is a retired member of one or more state bars, his current inactive status does not allow him to practice law. He is simply not licensed to represent the United States in this action.

In general, the court would not immediately dismiss a *qui tam* action that is brought *in pro per. See Safir v. Blackwell,* 579 F.2d 742,745 n.4 (2d Cir. 1978) (suggesting that, where a non-lawyer seeks to prosecute a *qui tam* suit *in pro per,* the correct remedy would be to direct that the action be dismissed "unless an attorney is retained."). Stoner would normally be given a set time period to secure counsel, but the Court is persuaded that other grounds warrant the dismissal of Stoner's federal claims. The Court addresses these grounds in turn.

B. Stoner's FCA claims against the SCCOE and the ESUHSD are dismissed for failure to state a claim because they are state agencies and not "persons" subject to suit under the FCA.

The FCA subjects liability to "any person," who among other things, "knowingly presents or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). The SCCOE argues that it and the ESUHSD, being state agencies, are not suable "persons" within the meaning of the FCA In support of its argument, the SCCOE relies heavily on the U.S. Supreme Court's opinion in

Vermont Agency of Natural Resources v. United State [sic] ex rel. Stevens, 529 U.S. 765, 120 S.Ct. 1858 (2000). In *Vermont,* the Supreme Court held that states and state agencies are not "persons" subject to *qui tam* actions under the FCA. 529 U.S. at 787-788.

While it is true that states and state agencies cannot be subject to suit under the FCA, *Vermont* did not address whether the same holds for local government entities. The Supreme Court recently held that local government entities, e.g., municipalities, are subject to suit under the FCA. *Cook County v. United States ex rel. Chandler,* 538 U.S. 119, 122 (2003). The key issue, therefore, is whether the SCCOE and ESUHSD are state agencies or a local government entities[sic].

In determining whether a government entity is a state agency, at least for Eleventh Amendment purposes, the Ninth Circuit uses a five-factor test: (1) whether a money judgment would **[*7]** be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3 whether the entity may sue or be sued in its own name; (4) whether the entity has the authority to hold property in its own name; and (5) whether the entity has the corporate status of a state agency. *Mitchell v. Los Angeles Community College Dist.,* 861 F.2d 198, 201 (9th Cir. 1988); *Belanger v. Madera Unified School Dist.,* 963 F.2d 248, 250-51 (9th Cir. 1992); *see also Regents of the Univ. of Cal.,* 519 U.S. at 429 n.5 (whether an entity is an arm of the state "and be answered only after considering the provisions of state law that define the agency's character"). These five factors are well known as the *Mitchell* factors. *Belanger,* 963 F.2d at 251. The Ninth Circuit has found using the *Mitchell* factors that California school districts and offices of

education are state agencies. *See Belanger,* 963 F.2d at 250-51 (involving a Section 1983 claim against a California school district); *J.C. Eaglesmith v. Ward,* 73 F.3d 857, 860 (9th Cir. 1996) (involving a Section 1983 claim against a California office of education). This Court finds it proper to use the *Mitchell* factors to determine whether the SCCOE and ESUHSD are "persons," i.e., whether they are state agencies or local government entities, within the meaning of the FCA. *See Vermont,* 529 U.S. at 779 (holding that the question of whether the [FCA] itself permits a cause of action is "logically antecedent to the existence of" the Eleventh Amendment question).

In *Eaglesmith,* the Ninth Circuit applied the *Mitchell* factors in determining that the Mendocino County Office of Education ("MCOE") was a California state agency for the purposes of the Eleventh Amendment;

> Although the MCOE, like a California school district, may sue and be sued and may hold property in its own name, militating against a finding that it is a state agency, these two factors are not entitled to as much weight as the other three. Here, as in Belanger, a money judgment would be satisfied out of state funds. In addition, public school education is a central government function and the MCOE is an intergral[sic] part of that function. Finally, the fifth factor, corporate status of state agents, offers no basis for distinguishing Belanger from this case. The MCOE, like the school district in Belanger, has the corporate

> status of an agent of the state for the operation of the school system.

73 F.3d at 860 (citations omitted). In reaching its decision, the court relied heavily on its decision in [*8] *Belanger* where it held that the first factor, the source of funds to be awarded, is the most crucial consideration. *Belanger,* 963 F.2d at 251 ("The most 'crucial question . . . is whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury.'") (citations omitted). Essentially, if a money judgment against a school district were to be satisfied out of state funds instead of local funds, e.g. property tax revenues, then the first *Mitchell* factor should weigh in favor of classifying a school district as a state agency. In *Belanger,* the Ninth Circuit found that the structure of California's centralized school funding system causes state and local revenue to be commingled into a single fund under state control. *Id.* at 252-252. As such, a money judgment against the SCCOE or ESUHSD would be paid from state funds because it is undisputed that their funding is controlled by California's school funding system. But Stoner argues that a monetary judgment against the SCCOE may be paid out of local funds instead of state funds because the SCCOE keeps records of which funds are which. The plaintiff in *Belanger* made this identical argument, and the court responded that "in light of California's centralized school funding system, this argument is irrelevant." The court explained:

> Under the [California] revenue limit system, state and local revenue is commingled in a single fund under state

control, and local tax revenue lost to a judgment must be supplanted by the interchangeable state funds already in the district budget. Any local funds withdrawn from the budget to pay a judgment are unavailable for educational purposes, and state funds in the budget must cover any critical educational expense that the local funds would have covered absent the judgment. This effectively draws state funds away from other programs in the budget to pay the judgment. In essence, any use of the commingled funds is a use of state funds. See Mitchell, 861 F.2d at 201 (stressing that "the district's budget is made up of funds received from the state's general fund pursuant to a state calculated formula").

Moreover, the local character of property tax revenue is lost when it is commingled with state funds under a state controlled revenue limit. As the district court noted, "If the entitlement from the property tax decreases, the amount of the revenue limit entitlement funded by the state increases, and vice-versa." Under the centralized revenue limit system, the allocation of property tax revenue is hopelessly intertwined with the allocation of state funds, and any change in the allocation of property tax revenue has a direct effect on the allocation of state funds.

> Finally, because the state has complete control over the amount of property tax revenue that the district receives, and because this revenue **[*9]** is simply credited toward the revenue limit payment from the state fund, the property tax revenue is no more local than state income taxes generated from the same area. The state has assumed the burden of funding public schools, and property tax revenue allocated to the public school revenue limit program is state money collected for a state purpose.
>
> In summary, the bulk of the school district's budget comes directly from the state school fund, and the property tax revenue in the budget is interchangeable with the state funds and is treated as state funds for all practical purposes. Under California's revenue limit system, a judgment against the school district would be satisfied from state funds.

Belanger, 963 F.2d at 252.

The SCCOE and ESUHSD must manage their funds in accordance with Califonia [sic] law, and under California's revenue limit system, a judgment against either of these entities would be satisfied from state funds. *See id.* Accordingly, this Court comes to the same conclusion as did the Ninth Circuit in *Eaglesmith* and *Belanger*: the SCCOE and ESUHSD have the corporate status of an agent of the state for the operation of their school system. Therefore, the SCCOE and ESUHSD, being state agencies, are not

"persons" subject to *qui tam* actions under the FCA. *Vermont,* 529 U.S. at 787-788.

Stoner argues that cases like *Eaglesmith* and *Belanger* are distinguishable because they involve actions by private citizens under 42 U.S.C. § 1983 and not *qui tam* actions under the FCA. Stoner contends that while a Section 1983 action may result in a monetary judgment payable to a private citizen, a judgment under the FCA will be paid to the U.S. because such an action is brought on behalf of the U.S. This Court is not convinced. First, Stoner fails to cite any case law for this proposition. In addition, out of an FCA monetary award, the relator's share may be up to 30 percent of the proceeds of the action, plus reasonable expenses, costs, and attorney's fees. 31 U.S.C. § 3730(d). If Stoner succeeded in a monetary award, it is clear that these funds would be paid from the State of California to Stoner, and such liability is impermissible under the Ninth circuit's reasoning in *Belanger,* 963 F.2d at 251-52 ("The most 'crucial question . . . is whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury.'") (citations omitted). **[*10]**

Because the SCCOE and ESUHSD are not "persons" subject to liability in a *qui tam* FCA action, the Court need not decide if these entities are immune from suit under the Eleventh Amendment. For the reasons stated above, Stoner's first three FCA claims against the SCCOE and ESUHSD are dismissed for failure to state a claim. *See Wool,* 818 F.2d at 1439 (dismissal is proper if it appears to a certainty that a plaintiff would not be entitled to relief under any set of facts which could be proved.).

B.[sic] Stoner's FCA claims against the remaining employee defendants are also dismissed for failure to state a claim because they are being sued in their official capacities.

Stoner also asserts his three FCA claims against three SCCOE employees. As discussed above, the FCA "does not subject a State (or state agency) to liability in such action." *Vermont,* 529 U.S. at 787-88. And if the SCCOE employees are being sued in their official capacities, then the FCA claims against them must be dismissed because an action against a state official in his official capacity "is not a suit against the official but rather is a suit against the State itself." *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71 (1989); *United States ex rel. McVey v. Bd. of Regents,* 165 F. Supp. 2d 1052, 1058 (N.D. Cal. 2001). In an effort to save his claims, Stoner attempts to characterize his FCA claims against the SCCOE employees as claims against them in their individual capacities. The Court is not convinced. The Court has reviewed the pleading and finds Stoner offers no evidence that the employee defendants were acting outside their official capacities during the incidents in question. At oral argument, Stoner argued that the employee defendants stepped outside their official capacities because they abused their authorities. The Court concludes that such allegations do not suffice. *See McVey,* 165 F. Supp.2d at 1059 (holding that abuse of authority allegations would not suffice to sustain an FCA claim absent a state official in his individual capacity). As such, Stoner's FCA claims against the three SCCOE employees are dismissed for failure to state a claim. *See Wool,* 818 F.2d at 1439 (dismissal is proper if it appears to a certainty that a plaintiff would not be entitled to

relief under any set of facts which could be proved.) Since all FCA claims have been dismissed against all defendants, only state claims remain [*11] in Stoner's complaint.

C. This Court chooses not to exercise supplemental jurisdiction over Stoner's remaining state claims.

A district court may decline to exercise supplemental jurisdiction over a state claim if the court has dismissed all claims over which it has original jurisdiction 28 U.S.C. 1367(c). The Court has dismissed all federal claims in this action. Stoner's remaining claims involve state question under the California False Claims Act as well as California contract and employment law. This Court declines to rule whether Stoner may maintain CFCA claims against a state agency, and in its discretion, declines to exercise supplemental jurisdiction over Stoner's remaining state claims. *See Carnegie-Mellon Univ. v. Cohill,* 484 US. 343, 350 n.7 (When all federal-law claims are eliminated before trial, "the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy convenience fairness and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims."). As such, Stoner's remaining state claims are dismissed for lack of subject matter jurisdiction.

V. CONCLUSION

For the reasons stated above, the SCCOE's motion to dismiss is GRANTED as to all defendants. Stoner's first, second, and third claims for relief are dismissed for failure to state a claim pursuant to Rule 12(b)(6).

Stoner's remaining state claims are dismissed for lack of subject matter jurisdiction pursuant to 12(b)(1). Finally, this Court holds that only a licensed attorney, properly admitted to the presiding court, may bring a *qui tam* action on behalf of the United States. All future Court dates in this action are vacated.

Dated: March 8, 2004

/s/ James Ware
JAMES WARE
United States District Judge

APPENDIX C

Pertinent provisions of the False Claims Act, 31 U.S.C. § 3729 et seq.

TITLE 31--MONEY AND FINANCE

SUBTITLE III--FINANCIAL MANAGEMENT

CHAPTER 37--CLAIMS

SUBCHAPTER III--CLAIMS AGAINST THE UNITED STATES GOVERNMENT

Sec. 3729. False claims

(a) Liability for Certain Acts.--Any person who--

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud

the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and Knowingly Defined.--For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim Defined.--For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption From Disclosure.--Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.--This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub. L. 99-562, Sec. 2, Oct. 27, 1986, 100 Stat. 3153; Pub. L. 103-272, Sec. 4(f)(1)(O), July 5, 1994, 108 Stat. 1362.)

Sec. 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General.--The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by Private Persons.--(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal

under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the Parties to Qui Tam Actions.--(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and

shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of

the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

* * *

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub. L. 99-562, Sec. 2, Oct. 27, 1986, 100 Stat. 3153; Pub. L. 103-272, Sec. 4(f)(1)(O), July 5, 1994, 108 Stat. 1362.)

* * * * *

Sec. 3732. False claims jurisdiction

(a) Actions Under Section 3730.--Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims Under State Law.--The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(Added Pub. L. 99-562, Sec. 6(a), Oct. 21, 1986, 100 Stat. 3158.)

APPENDIX D

Pertinent provisions of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq.

Sec. 1400. Short title; findings; purposes

(a) Short title

This chapter may be cited as the ``Individuals with Disabilities Education Act".

(b) Omitted

(c) Findings

Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met because--

(A) the children did not receive appropriate educational services;

(B) the children were excluded entirely from the public school system and from being educated with their peers;

(C) undiagnosed disabilities prevented

the children from having a successful educational experience; or

(D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by--

(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to--

(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and

(ii) be prepared to lead productive and independent adult lives, to the maximum extent possible;

* * *

(Pub. L. 91-230, title VI, Sec. 601, as added Pub. L. 108-446, title I, Sec. 101, Dec. 3, 2004, 118 Stat. 2647.)

* * * * *

Sec. 1401. Definitions

Except as otherwise provided, in this chapter:

* * *

(19) Local educational agency

(A) In general

The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.

* * *

(31) State

The term "State" means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.

(32) State educational agency

The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

* * *

(Pub. L. 91-230, title VI, Sec. 602, as added Pub. L. 108-446, title I, Sec. 101, Dec. 3, 2004, 118 Stat. 2652.)

* * * * *

Sec. 1403. Abrogation of State sovereign immunity

(a) In general

A State shall not be immune under the 11th amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter.

(b) Remedies

In a suit against a State for a violation of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as those remedies are available for such a violation in the suit against any public entity other than a State.

(c) Effective date

Subsections (a) and (b) apply with respect to

violations that occur in whole or part after October 30, 1990.

(Pub. L. 91-230, title VI, Sec. 604, as added Pub. L. 108-446, title I, Sec. 101, Dec. 3, 2004, 118 Stat. 2659.)

* * * * *

Sec. 1411. Authorization; allotment; use of funds; authorization of appropriations

* * *

(i) Authorization of appropriations

For the purpose of carrying out this subchapter, other than section 1419 of this title, there are authorized to be appropriated--

(1) $12,358,376,571 for fiscal year 2005;
(2) $14,648,647,143 for fiscal year 2006;
(3) $16,938,917,714 for fiscal year 2007;
(4) $19,229,188,286 for fiscal year 2008;
(5) $21,519,458,857 for fiscal year 2009;
(6) $23,809,729,429 for fiscal year 2010;
(7) $26,100,000,000 for fiscal year 2011; and
(8) such sums as may be necessary for fiscal year 2012 and each succeeding fiscal year.

(Pub. L. 91-230, title VI, Sec. 611, as added Pub. L. 108-446, title I, Sec. 101, Dec. 3, 2004, 118 Stat. 2662.)

Sec. 1412. State eligibility

(a) In general

* * *

(17) Supplementation of State, local, and other Federal funds

* * *

(B) Prohibition against commingling

Funds paid to a State under this subchapter will not be commingled with State funds.

* * *

(Pub. L. 91-230, title VI, Sec. 612, as added Pub. L. 108-446, title I, Sec. 101, Dec. 3, 2004, 118 Stat. 2676.)

Sec. 1413. Local educational agency eligibility

(a) In general

A local educational agency is eligible for assistance under this subchapter for a fiscal year if such agency submits a plan that provides assurances to the State educational agency that the local educational agency meets each of the following conditions:

(1) Consistency with State policies

The local educational agency, in providing for the education of children with disabilities within its jurisdiction, has in effect policies, procedures, and programs that are consistent with the State policies and procedures established under section 1412 of this title.

(2) Use of amounts

(A) In general

Amounts provided to the local educational agency under this subchapter shall be expended in accordance with the applicable provisions of this subchapter and--

(i) shall be used only to pay the excess costs of providing special education and related services to children with disabilities;

(ii) shall be used to supplement State, local, and other Federal funds and not to supplant such funds; and

(iii) shall not be used, except as provided in subparagraphs (B) and (C), to reduce the level of expenditures for the education of children with disabilities made by the local educational agency from local funds below the level of those expenditures for the preceding fiscal year.

* * *

(4) Permissive use of funds

(A) Uses

Notwithstanding paragraph (2)(A) or section 1412(a)(17)(B) of this title (relating to commingled funds), funds provided to the local educational agency under this subchapter may be used for the following activities:

(i) Services and aids that also benefit nondisabled children

For the costs of special education and related services, and supplementary aids and services, provided in a regular class or other education-related setting to a

child with a disability in accordance with the individualized education program of the child, even if 1 or more nondisabled children benefit from such services.

(ii) Early intervening services

To develop and implement coordinated, early intervening educational services in accordance with subsection (f).

(iii) High cost education and related services

To establish and implement cost or risk sharing funds, consortia, or cooperatives for the local educational agency itself, or for local educational agencies working in a consortium of which the local educational agency is a part, to pay for high cost special education and related services.

* * *

(7) Information for State educational agency

The local educational agency shall provide the State educational agency with information necessary to enable the State educational agency to carry out its duties under this subchapter, including, with respect to paragraphs (15) and (16) of section 1412(a) of this title, information relating to the performance of children with disabilities participating in programs carried out under this subchapter.

* * *

(g) Direct services by the State educational agency

(1) In general

A State educational agency shall use the payments that would otherwise have been available to a local educational agency or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that local educational agency, or for whom that State agency is responsible, if the State educational agency determines that the local educational agency or State agency, as the case may be--

(A) has not provided the information needed to establish the eligibility of such local educational agency or State agency under this section;

(B) is unable to establish and maintain programs of free appropriate public education that meet the requirements of subsection (a);

(C) is unable or unwilling to be consolidated with 1 or more local educational agencies in order to establish and maintain such programs; or

(D) has 1 or more children with disabilities who can best be served by a regional or State program or service delivery system designed to meet the needs of such children.

(2) Manner and location of education and services

The State educational agency may provide special education and related services under

paragraph (1) in such manner and at such locations (including regional or State centers) as the State educational agency considers appropriate. Such education and services shall be provided in accordance with this subchapter.

* * *

(Pub. L. 91-230, title VI, Sec. 613, as added Pub. L. 108-446, title I, Sec. 101, Dec. 3, 2004, 118 Stat. 2694.)